A

NCFM ENTERPRISE SDN BHD

v.

KEJURUTERAAN RASSHIN SDN BHD & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[SUIT NO: 22-131-2007-II]
14 DECEMBER 2009

C ***CONTRACT:*** *Breach - Building contract - No payment for work done - NCFM's payment back to back with main contract - Once Rasshin received payment from the Ministry, must effect payment to NCFM - Whether NCFM also entitled to claim for the earthworks for SMK Medamit*

D ***CONTRACT:*** *Damages - Liquidated damages - Building contract - Delay in completion of project - Whether Rasshin entitled to impose liquidated ascertained damages against NCFM - No provision for incorporation of terms of the main contract into the sub-contract agreement*

E *- Amount Rasshin decided to charge NCFM unreasonable - No clear evidence NCFM should be blamed totally for the delay - 30% of liquidated ascertained damages imposed on Rasshin by the Ministry - Whether a fair amount*

TRUSTS AND TRUSTEES: *Breach of Trust - Sub-contract - Money*

F *from the Ministry to the extent of the sub-contract sum only held in trust for NCFM by Rasshin - Whether Directors of Rasshin breached that trust when payment in full not effected - Must be clear evidence of their personal involvement in not just withholding the payment but using them for their own personal gain*

G

The 1st defendant ("Rasshin") was appointed by the Ministry of Education ("the Ministry") to construct teachers' quarters for SMK Limbang, SMK Seri Patiambun and SMK Medamit. The agreed contract price was RM8,388,888. By an agreement dated

H 27 September 2002, Rasshin appointed the plaintiff ("NCFM") to be their sub-contractor for the contract price of RM5,400,000 (excluding the provisional sum of RM280,016). This agreement was varied on 12 January 2004 wherein Rasshin took over the construction of SMK Medamit and the contract price was revised to

I RM3,815,329.83. NCFM claimed that despite having completed the teachers' quarters for two schools, Rasshin only made progress payments to them amounting to RM2,532,671.24, leaving a balance

of RM1,282,658.59 unpaid even though Rasshin had been paid in full for the project by the Ministry. Rasshin was imposed liquidated ascertained damages totalling RM624,413.44 by the Ministry for the delay in the project for all three schools. NCFM subsequently claimed for the balance unpaid as well as RM112,644 being the costs of earthworks for SMK Medamit which they said Rasshin had earlier agreed to pay them. NCFM further sued the 2nd to 4th Defendants, all Directors of Rasshin for breach of trust on the grounds that they have collectively and individually utilized the payments for the project by the Ministry for their own personal purpose and sought damages for breach of trust against them. Rasshin and its Directors maintained *inter alia*, that they were entitled to charge NFCM liquidated ascertained damages for the delay in carrying out the works which were supposed to have been completed by 28 July 2003 for each of the schools. They alleged that NCFM has breached the sub-contract agreement by reason of the delay, the defective works and non-rectification of the same, failure to pay their suppliers to complete the works at SMK Medamit and abandoning the works in the other two schools. By reason of that breach they counterclaimed RM1,913,289.91 being the loss of profit they suffered for the project. They counterclaimed for this amount as well as for damages for trespass, harassment pertaining to the unpaid debts under this project and threat which they alleged NCFM's servant and agent or employees had committed when they went to the office of the Chairman of Pembinaan Rassnorm Sdn Bhd.

Held (allowing the plaintiff's claim for the balance of the sub-contract sum of RM1,282,658,59 and for earthworks in SMK Medamit at RM112,644, dismissing the plaintiff's claim for damages for breach of trust against the 2nd to the 4th defendants; dismissing the 1st defendant's counterclaim for loss of profit and allowing the defendants' claim for damages for harassment at RM200,000 and damages for delay in completing the project at RM187,324):

(1) Since the term of NCFM's payment was back to back with that of the main contract, once Rasshin received their payment from the Ministry, they must effect payment to NCFM. Having completed the project for the two schools, NCFM should be

paid for the work done which value was already agreed at RM3,815,329.83. As NCFM admitted receiving payments of RM2,532,671.24, the balance due to it is RM1,282,658.59. Rasshin's insistence not to pay NCFM for the variation work at SMK Medamit on the ground that it falls under provisional sum when they themselves have received additional payment is unconscionable especially given their agreement on 12 January 2004 that NCFM be paid for the earthworks. Accordingly, this claim for RM112,644 is allowed. (para 8, 13, 17, 18 & 19)

(2) Nowhere was it agreed between them that Rasshin could impose liquidated ascertained damages against NCFM. Although there is such a provision in Rasshin's main contract with the Ministry, there is no provision for incorporation of the main contract terms into the sub-contract agreement. The court did not have clear evidence to say that NCFM should be blamed totally for the delay to hold that they have breached their sub-contract agreement. However, given the contemporaneous documents issued by Rasshin on the delay on NCFM's part, NCFM must shoulder part of the blame for the delay in the project but not in the percentage stated by Rasshin. In other words not as liquidated ascertained damages but general damages. Using the amount of liquidated ascertained damages imposed on Rasshin by the Ministry (RM624,413.44) as a basis, 30% of that amount would be the right figure to order here *ie*, RM187,324. (paras 22, 23 & 26)

(3) The court agrees that the payment Rasshin received from the Ministry to the extent of the sub-contract sum only was held in trust for NCFM by Rasshin. However, the Directors of Rasshin have not breached that trust when payment in full was not effected. There must be clear evidence of their personal involvement, jointly and severally, in not just withholding the payment but using them for their own personal gains. Furthermore, NCFM have pursued their contractual remedy and are entitled to the balance of the sub-contract sum with interest. That is sufficient restitution for their loss. To award them damages for breach of trust on top of the liquidated amount given for breach of contract would tantamount to unjust enrichment. Accordingly their claim under this head is not allowed. *Quistclore Investments Ltd v. Rolls Razor, Ltd. (in voluntary liquidation) and & Others* (refd). (paras 41 & 42)

(4) Rasshin's claim for loss of profit stems from alleged breaches of the sub-contract agreement by NCFM and that NCFM has repudiated the contract. This claim is very much tied to the deductions and liquidated ascertained damages imposed on NCFM. Since the court has decided on these two issues in NCFM's favour, Rasshin's claim for loss of profit is dismissed. (para 44)

(5) NCFM had in desperation for the money owing to them resorted to unlawful means to get it by taking the law into their own hands. It has also been proved on a balance of probability that the staff and Directors of Rasshin suffered as a result of this harassment. Accordingly the court grants them damages of RM200,000 for the harassment suffered and would deduct this from the balance of the sum due under the sub-contract. (paras 47 & 50)

(6) The plaintiff's claim for the balance of the sub-contract sum of RM1,282,658,59 and for earthworks in SMK Medamit at RM112,644 is allowed totaling RM1,395,302.59. However, setting off RM200,000 being damages for harassment, and RM187,324 being damages for delay in completing the project, judgment for the plaintiff is entered for RM1,007,978.59 only. The plaintiff's claim for damages for breach of trust against the 2nd to the 4th defendants is dismissed. The 1st defendant's counterclaim for loss of profit is dismissed. The defendants' claim for damages for harassment is allowed for RM200,000 and damages for delay in completing the project is allowed at RM187,324. (para 51)

Case(s) referred to:

L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd [2007] 8 CLJ 507 HC ***(refd)***

Quistclore Investments Ltd v. Rolls Razor, Ltd. (in voluntary liquidation) and & Others [1968] 1 All EC 613 ***(refd)***

For the plaintiff - Bong Ah Loi; M/s Suhaili & Bong Advoc

For the defendants - Khairil Azmi Mohamad Hasbie (Hasiera Hashim with him); M/s Azmi & Co

Reported by Susheila Sreedharan

A

JUDGMENT

Rhodzariah Bujang JC:

[1] Kejuruteraan Rasshin Sdn Bhd ("Rasshin" for short) was appointed by the Ministry of Education ("the Ministry" for short) to construct teachers' quarters for three schools in Limbang which were SMK Limbang, SMK Seri Patiambun and SMK Medamit. The agreed contract price was RM8,388.888. KIP Management Sdn Bhd was appointed by the Ministry as consultant for the project.

[2] By an agreement dated 27 September 2002, Rasshin appointed NCFM Enterprise Sdn Bhd ("NCFM" for short) to be their sub-contractor for the said project for the contract price of RM5,400,000 (excluding the provisional sum of RM280,016). The sub-contract agreement was varied on 12 January 2004 by another agreement wherein the construction of SMK Medamit was taken over by Rasshin and the contract price was revised to RM3,815,329.83. NCFM claimed that despite having completed the teachers' quarters for two schools which value of work (inclusive of retention sum) was RM3,815,329.83, Rasshin only made progress payments to them amounting to RM2,532,671.24, leaving a balance of RM1,282,658.59 unpaid even though Rasshin had been paid in full for the project by the Ministry. They contended that since the term of their payment was back to back with that of the main contract, they should have been paid their full sub-contract sum as well. Thus by a summons dated 7 December 2006 and re-amended statement of claim dated 27 July 2009 NCFM has claimed for the balance unpaid as well as RM112,644 being the costs of earthworks for SMK Medamit which they said Rasshin had earlier agreed to pay them.

[3] In addition, NCFM further sued Masnoon bt. Bujang Mohd Nor, Sabrina bt. Bujang Mohd Nor and Ruslan bin Bujang, all Directors of Rasshin for breach of trust on the grounds that they have collectively and individually (for Ruslan bin Bujang) utilized the payments for the project by the Ministry for their own personal purpose. NCFM therefore prayed for damages for breach of trust against the said Directors.

[4] In their re-amended defence and counterclaim, Rasshin and it's Directors pleaded, *inter alia*, that they were entitled to charge NFCM liquidated ascertained damages at 0.15% per day or a maximum of 10% of the 'contract value' for the delay in carrying

out the works which were supposed to have been completed by 28 July 2003 for each of the schools. They alleged that NCFM has breached the sub-contract agreement by reason of the delay, the defective works and non-rectification of the same, failure to pay their suppliers to complete the works at SMK Medamit and abandoning the works in the other two schools. By reason of that breach they claim RM1,913,289.91 being the loss of profit they suffered for the project. They counterclaimed for this amount as well as for damages for trespass, harassment and threat which they alleged NCFM's servant and agent or employees had committed when they went to the office of the Chairman of Pembinaan Rassnorm Sdn Bhd. These claims have been denied by NCFM in their reply to defence and defence to counterclaim.

[5] The above represents the summary of the plaintiff's and defendants' claim and or defence in this action.

[6] In considering the claim and counterclaim as stated above, I resolved to structure this judgment along these lines.

(i) The terms of payment.

(ii) The value of work done.

(iii) The liquidated ascertained damages.

(iv) The deductions.

(v) The breach of trust.

(vi) The loss of profit.

(vii) Rescission of the sub-contract agreement.

(viii) The trespass and harassment.

The Terms Of Payment

[7] The letter of Sub-Contract Award (exh. P1) is what the sub-contract agreement is titled. It appears at pp. 1-4 of exh. B4. The terms of payment appears at cl. E of the agreement and it says as follows:

E. Terms Of Payment

1. 5% Mobilization Fee upon Signing of Contract.

2. Progress Payment shall be based on a BACK-TO-BACK BASIS with the Main Contract. Retention Money of Five Percent (5%) shall be deducted on the Progress Claim as per the requirement of the Main Contract and to be released after the Defect Liability Period of Twelve (12) Months.

[8] The emphasis here is that it is "back to back" with the main contract and this means that once Rasshin have received their payment from the Ministry, they must effect payment to NCFM. In view of the clarity of the words employed here, there is just no two ways about the interpretation to be given to this clause.

[9] The said clause also mentioned payment of 5% upon signing of mobilization fee but NCFM's Managing Director, Sim Yam Huat (PW1) testified in his witness statement (WSPW1) that it (a sum of RM150,000) was only paid on 15 January 2003 as evidenced by Rasshin's own document at p. 329 of exh. B4. It being their own document, I have no hesitation in accepting that the content is indeed true. Thus, although Sim Yam Huat later in his statement contended that RM135,000 was deducted as mobilization fee, his earlier reliance on the said document precludes him from disputing it's content subsequently. It is to be noted that 5% of the sub-contract sum of RM5,400,000 is RM270,000 but given the variation of the value of sub-contract to RM3,815,329.83 with the taking over of SMK Medamit by Rasshin, it is more correct to say that the mobilization fee which NCFM was entitled should only be RM190,766.49.

The Value Of Work Done

[10] As summarized earlier, it is not in dispute that all three schools have been completed and Rasshin has been paid by the Ministry in full except for the deductions for liquidated ascertained damages imposed by the Ministry to them in the following amount.

(i) SMK Medamit	:	RM496,545.48
(ii) SMK Limbang	:	RM 66,833.40
(iii) SMK Seri Patiambun	:	RM 61,034.56
Total	:	RM624,413.44
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[11] This fact and figures I have obtained from the evidence of Noorazan bin Hj. Morshidi who was the Project Manager for KIP Management Sdn Bhd and NCFM's second witness. I have decided, in all fairness to both parties and despite the fact that Noorazan was called by the NCFM, that his evidence is the most impartial and reliable guide in resolving the dispute between the parties as by reason of his position, he had substantial knowledge on the project and has nothing to gain from giving evidence for and against either one of them.

[12] Now from his evidence, the said certificate of practical completion in respect of the teachers' quarters of SMK Limbang and SMK Seri Patiambun were issued to Rasshin on 17 May 2004 and that it was NCFM who built these quarters. Therefore, Rasshin's statement of defence that NCFM had abandoned the project in these two schools was completely false and was clearly not made in good faith.

[13] Having completed the project for the two schools, I failed to see why NCFM should be denied payment for the work which they had done and the value of that work was already agreed at RM3,815,329.83. NCFM's chronology of Payment Certificates & Payments at p. 354 of exh. C4 shows that RM2,480,981 have been paid by Rasshin to them but by their own pleading at para. 11 thereof, they have admitted receiving payments of RM2,532,671.24. Deducting that from the agreed sub-contract sum of RM3,815,329.83, the balance due to the NCFM is RM1,282,658.59.

[14] In this regard it is to be noted also that Rasshin had issued interim payment certificates Nos. 10-15 (at pp. 317-320 of exh. B4) where they have certified that a sum of RM1,118,541.10 remained outstanding to NCFM. In *L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd* [2007] 8 CLJ 507, it was held that although interim certificates are subject to the final measurement of the actual work done at the end of the contract, it constitutes a finality on the assessment of the work done by the contractor which the employer is obliged to pay. Therefore, if I were wrong in saying that RM1,282,658.59 is due to NCFM by making a simple arithmetical deduction as I did earlier, there can be no doubt that the amount as Rasshin themselves certified is owing to NCFM. I make this finding fully conscious of the fact alleged by Rasshin's witness, Ruslan Bujang that the certificates were prepared in haste

after the threatening visits made by NCFM's agents/servants to their office and would still maintain my earlier view on the amount owing because even if Rasshin erred in the computation of the figures, it was actually for a sum which is lower and not in excess of what is due to NCFM under the contract.

[15] I would like to conclude this issue by briefly mentioning Rasshin's allegation that NCFM has failed to rectify their defective work. In answer to that I would again refer to Noorazan's evidence who categorically said that the defects in the works were minor and that NCFM had remedied them. I accept his evidence and would dismiss the allegation as unmeritorious.

[16] What then remains for me to decide is whether Rasshin could lawfully make the deductions as mentioned earlier and whether NCFM is also entitled to claim for the earthwork for SMK Medamit. Since the deductions come under a separate issue which I had earlier itemized, I will consider the claim for the earthworks first.

Earthworks At SMK Medamit

[17] This is perhaps a good time to explain why the building of the teachers' quarters had to be taken over by Rasshin. Undoubtedly, there had been delay in the completion of the project at SMK Medamit. In Noorazan's cross-examination, he explained that the earlier site for the teachers' quarters in the school was relocated to another site because the Natural Resources Environment Board found the project site was not safe due to dangerous slope and Ruslan in his cross-examination agreed that he asked NCFM to stop work at the site in January 2003. Ruslan also confirmed that he applied for and was granted by the Ministry an extension of time for the project at SMK Medamit and among the reasons he cited in his letter (appearing at pp. 1043-1045 of exh. C2) was the relocation of site, orientation of the quarters, school examination, inclement of weather (heavy rainfall) as well as resurveying and re-establishment of site store and site facilities.

[18] The delay in the project at SMK Medamit necessitated a meeting between Ruslan, Noorazan and NCFM's Sim Yam Huat (aka Desmond Sim) on 12 January 2004 and what they agreed in the meeting were, *inter alia*, the taking over of the project there by Rasshin and in respect of the earthwork what was agreed was stated as follows:

> For the Earth Work Variation Order Work at SMK Medamit, **it will be paid to NCFM when MOE/KIP release the V.O. Work Payment.** NCFM will only be paid for the V.O. work portion done by NCFM. (see page 78 of Exh. B4 which is a letter written by Ruslan to NCFM to put on record what was agreed at the meeting and the emphasis is mine).

[19] In Ruslan's cross-examination, he said even though the work was a variation order, it falls under provisional sum but agreed that Rasshin had received additional payment for the earthworks from the Ministry although he insisted that it falls under provisional sum.

[20] With respect, the insistence not to pay NCFM for this variation work on that ground when they themselves have received additional payment is in my view unconscionable especially in the face of their earlier agreement made on 12 January 2004 that NCFM be paid for the earthworks. I would therefore allow this claim which in actual fact was for RM135,443.24 (see p. 16 of exh. B4) but has been slashed down to RM112,644. The lesser figure is the amount which I will enter in the judgment of this case.

Liquidated Ascertained Damages

[21] I have earlier mentioned that Rasshin was imposed liquidated ascertained damages totalling RM624,413.44 by the Ministry for the delay in the project for all three schools. In turn, Rasshin has decided to impose liquidated ascertained damages against NCFM totalling RM2,086,789.19 and the breakdown of the figures are as follows:

(i) SMK Medamit	:	RM1,267,135.01
(ii) SMK Limbang	:	RM 426,220.17
(iii) SMK Seri Patiambun	:	RM 393,434.01
Total	:	RM2,086,789.19
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[22] This figure is obtained from the defendants' own document at p. 194 of exh. C4 ie in interim valuation no. 15. Quite apart from the issue of whether Rasshin was entitled to impose liquidated ascertained damages against NCFM, simply by looking at the 2 figures of liquidated ascertained damages – one by the Ministry and

another by Rasshin, the unreasonableness of Rasshin's claim for liquidated ascertained damages is very obvious. The employer in this case has deemed it fit to charge them only RM624,413.44 for the delay of the project and yet Rasshin has decided to charge NCFM more than triple that amount and I simply could not find any justification for their action.

[23] I find even lesser justification for it when I examined the sub-contract agreement between the parties. Nowhere was it agreed between them that Rasshin could impose liquidated ascertained damages against NCFM. Even though there is such a provision in Rasshin's main contract with the Ministry, I would agree with Mr. Bong Ah Loi that there is no provision for incorporation of the terms of the main contract into the sub-contract agreement. Ruslan said in his re-examination that Sim Yaw Huat has agreed to the incorporation of the terms of the main contract into their sub-contract agreement and agreed to the imposition of the liquidated ascertained damages but his assertion is against the documentary evidence in the form of letters written by Sim Yaw Huat to Rasshin protesting against the imposition of the same.

[24] However, there cannot be any doubt that there was delay in the whole project. According to clause B of sub-contract it was supposed to be completed within ten months from the date of possession of each site which is stated in the said clause to be 28 September 2002. Ten months would mean the project should have been completed by July 2003. NCFM was given a further extension of time for six months said Ruslan in his witness statement (WSDW1) because of the relocation of SMK Medamit. Therefore, the completion date said he was 27 July 2003. However, Ruslan's own letter to NCFM at p. 310 of exh. B4 dated 28 May 2003 gave them six months extension. Although he did not say that the six months is from the date of that letter, in the absence of a contrary intention, it stands to reason that the extension must be from the letter giving the approval. It is reasonable to make that inference because in the cross-examination of Noorazan, he said Rasshin was infact was given an extension of six months to complete the whole project which gave the new completion date as 24 January 2004. Since the actual physical work was done by NCFM, the sub-contractor and not them, it would be reasonable to infer that the extension of time given to them should apply to the sub-contractor as well. Therefore, considering the extension of time

given, the delay till the certificate of completion was issued for the project in the SMK Limbang and Seri Patiambun on 17 May 2004 was only four months. NCFM and Rasshin have both accused the other of causing the delay with NCFM saying that it was primarily because of late and irregular payments whereas Rasshin said they did not carry out the work according to the plan, specifications and drawings and produced defective works which needed rectifications. Now Noorazan has corroborated NCFM's reasons when he said in his cross-examination that the Ministry itself delayed payment and Ms. Hasiera Hashim, Rasshin's own counsel, herself in her question at p. 44 line 10 of the notes of proceedings admitted that the Ministry was slow in paying. Of course, as stated earlier, for SMK Medamit, the relocation of the site had contributed to the delay in it's completion besides the slow payment from the government. This, Noorazan confirmed in his cross-examination at p. 43 lines 2-13 of the notes of proceedings.

> Q Do you know why apart from the relocation of Sekolah Menengah Kerajaan Medamit why the work progress on Sekolah Menengah Kerajaan Seri Patiambun and Sekolah Menengah Kerajaan Limbang is behind schedule?
>
> A Slow payment from the Government.
>
> Q Which payment?
>
> A I am not sure.
>
> Q You are not sure or cannot remember?
>
> A I cannot remember.
>
> Q Then how can you remember the payment is slow?
>
> A You ask me which payment, so I said not sure. Honestly, I cannot remember and I do not wish to refer to the documents.

[25] Although he did not refer to a specific document to support his evidence that payment was slow (when asked by counsel) that failure does not affect the credibility of what he said in respect of the payment which as the project consultant he would be in the position to know. I cannot fault him for not wanting to refer to the documents. Altogether the parties in this case filed 10 volumes of documents. Some of the defendants' bundles of documents were more than 6 inches thick and seeing the stacks of bundles of

documents spread out on counsels' table, the task of trying to find a document amongst the bundles is daunting to any person, even if it were the interested party to this dispute and let alone one who has no vested interest in it like Noorazan.

[26] I ought not, I know take the delay for SMK Medamit out of the equation for the Certificate of Practical Completion for that school was only granted at the end of 2005 but, I do not think I have the clear evidence to say that NCFM should be blamed totally for the delay such as to hold that they have breached their sub-contract agreement. However, given the contemporaneous documents in the form of letters of warnings and reminders on the delay on the part of NCFM issued by Rasshin, NCFM must in my view shoulder part of the blame for the delay in the project but not in the percentage stated by Rasshin. In other words not as liquidated ascertained damages but general damages. It is fair that I assessed that damages using the amount of liquidated ascertained damages imposed on Rasshin by the Ministry (RM624,413.44) as a basis and I would consider 30% of that amount as the right figure to order in this case ie RM187,324.

The Deductions

[27] The plaintiffs have pleaded that the following deductions have been made by Rasshin against the contract sum.

(i) Main contractor : RM 15,000

(ii) Sub-contractors : RM749,058.58

(iii) PD Facilities : RM 13,200

(iv) APK No. 1 : RM167,783.23

[28] In their defence at para. 18 thereof, Rasshin has explained the deductions as follows:

(i) RM15,000 was recoupment of advances made by Rasshin to NCFM.

(ii) RM749,058.58 was what Rasshin had paid the suppliers on behalf of NCFM and for engaging sub-contractors to complete their work.

(iii) RM13,200 was for the cost of reconstructing new site office and/or new storage and/or new hoarding and/or cost of other site preparatory work at SMK Medamit. NCFM had used materials

from the demolition of existing quarters at SMK Medamit which property belonged to the Ministry to construct the hoarding and therefore the materials must be returned. Rasshin had to reconstruct new hoarding for the school.

(iv) RM167,783.23 was the amount deducted by the Ministry from Rasshin under "Arahan Perubahan Kontrak" and since the contract between them and NCFM was back to back, they are entitled to deduct the same amount from the sub-contract sum.

[29] In his witness statement, Ruslan has justified these deductions at para. 55 and appearing at pp. 59-63 thereof. The evidence of these deduction are in Rasshin's interim certificate no. 10-15 at pp. 190-191 of exh. C4.

RM15,000

[30] This amount was a recoupment of the mobilization fee of RM150,000 paid to NCFM. NCFM claimed that infact Rasshin had deducted RM181,640 up to their payment certificate No. 9R. However, NCFM have shown in their chronology of payment certificates and payments appearing at p. 354 of exh. B4 (which could be verified from the payment certificates and agreed as to authenticity and content by the parties) that the total deduction was RM181,640. I therefore agree that this further deduction of RM15,000 was unjustified.

RM749,058.58

[31] The details of the breakdown of this figure appears at p. 211 of exh. C4 and they are as follows:

Item	Description	Amount (RM)
	Backcharged	
1.	Travelling Charges (Refer Project Ledger)	28,980.54
2.	Payment on Behalf (Appendix II)	312,686.96
3.	Consultation Fee	28,953.00
4.	RB Effan Contract	62,795.00
5.	Finance Charges (Provisional)	35,000.00
6.	Extension of Insurance	32,068.58
7.	Cabin – Site office & Worker's accommodation	18,500.00
8.	Remedial Works - as per letter ref; RGLB (Limbang)/KRSB/NCFM/03-12/L053	7,000.00

9. Salary En. Ruslan Bujang	75,000.00
10. Salary Richard Unut	25,500.00
11. House Rental Limbang	2,450.00
12. Provision by Payment on Behalf	
of Choo Mang Ting	89,500.00
of Quantity Plus	22,038.50
of Teng Wang Tung	8,586.00
Total Backcharged	749,058.58

[32] Now it is clear from the itemized particulars above that what had been backcharged to NCFM were not just payments made on behalf of them to suppliers as alleged but other items as well.

[33] Rasshin's own documents supporting these claims in exh. C4 separated into the following classifications ie, "Wages paid on behalf", "Materials paid on behalf", "Payment to sub-Contractor on behalf", "Payment to RB Effan on behalf", "Administrative charges" and lastly "Others" (all from pp. 221 to 629) actually show that the breakdown of their figures as shown above were not entirely proved by these documents.

[34] Mr. Bong Ah Loi in his cross-examination of Ruslan had drawn his attention to the fact that some of these documents are repetitious but in his re-examination, Ruslan explained that some documents were repeated because they were attachments for payment (see p. 96 of the notes of proceedings). Now, even if I accept his explanation for the repetitious documents, I do not have his explanation why restaurant's bills for food and liquor, entertainment bills and credit card expenses unrelated to the project were also included in the supporting documents. The inclusion of these expenses is again unconscionable and without a single doubt, totally unjustified.

[35] Ruslan was also asked in cross-examination why he backcharged RM20,000, a bill from Choo Mang Ting Electrical Service for the electrical works in SMK Medamit. He said that NCFM was still liable for all the whole project. In re-examination, however, he referred to p. 573 of exh. C4, his own internal memo in which it was stated that RM20,000 was NCFM's debt to Choo Mang Ting which he agreed to pay first on their behalf and to be

"deducted from NCFM's contract". No one from Choo Mang Ting Electrical Service was called in support of this claim and neither was Sim Yaw Huat cross-examined specifically on this amount.

[36] At the end of the day however, what hampers my effort in agreeing to Rasshin's deductions discussed above is their inclusion of unrelated and what I consider as frivolous claims under this heading and their failure to particularize which supplier and how much exactly were paid to them on NCFM's behalf. The documents (in exh. C4) as I mentioned ran to 408 pages. To separate the grain from the chaff should not be the task of the court but the parties themselves. Even though these documents were grouped according to subject matters as I stated earlier, but they must relate to the details of the breakdown for the deduction of RM749,058.58. Thus, it is with regret that I come to the conclusion that the evidence presented in support of this deduction is not credible enough for me to allow any of them.

RM13,200

[37] Ruslan explained in his witness statement (WSDW2) that NCFM failed to construct new site office and/or new storage and/or hoarding and/or cost of other site preparatory work.

[38] The evidence of Ruslan on this deduction was almost exactly as what has been pleaded and he did not say how much was incurred for what as the construction here was pleaded and testified by him as "and/or" I am again handicapped by the imprecise nature of this evidence to allow the deduction so claimed. Furthermore, as rightly pointed out by Mr. Bong Ah Loi, the defendants' own exhibit, p. 191 of exh. C4 in fact states that this amount was for "Phone bills RM600 x 22 months (December 2003 – September 2005)", thus showing further proof that Rasshin is itself unsure what the deduction was for.

RM167,783.23

[39] Ruslan explained in his witness statement (WSDW1) that the amount was an "Estimated Deduction Provisional amount" under the "Arahan Perubahan Kontrak (APK2)" and he referred to item 3 at p. 417 of exh. C1. He said further that this amount 'depend on the final certificates/actual account with Employer which has not been issued or finalized by the Employer yet'. Again, there is failure

by Rasshin to show where this amount was derived from – if deducted by the Ministry as they claimed. Secondly, and contractually why they can backcharged this amount to NCFM. In the absence of such evidence, it would appear that the deductions imposed was both unilateral and arbitrary and it should also not be allowed.

Breach Of Trust

[40] Mr. Bong Ah Loi has cited the case of *Quistclore Investments Ltd v. Rolls Razor, Ltd. (in voluntary liquidation) and & Others* [1968] 1 All EC 613 in support of his proposition that the money from the Ministry is actually held in trust for NCFM by Rasshin. In the said case, Rolls Razor, Ltd borrowed money from Quistclore Investments, Ltd for the specific purpose of paying dividends to it's shareholders. It was deposited with a bank in which Rolls Razor had a huge overdraft but the deposit made by Quistclore Investments which was put into a separate account with the bank exceeded the indebtedness of Rolls Razor to the said bank. However, before payments of the dividends were made, Rolls Razor went into voluntary liquidation. The bank sought to have the money so deposited to be utilized to set off the indebtedness of Rolls Razor with it. Quistclore Investments filed an action for a declaration that it was the absolute beneficiary of the said money and the Court of Appeal agreed that, the money being lent to it for a specific purpose, a trust had arisen and if it could not be utilized for that purpose then it should be repaid to Quistclore Investments.

[41] In the sense that payment by the Ministry to Rasshin was for the construction of the teachers' quarters and NCFM was doing the construction of the quarters for Rasshin, I would agree that the payment they received to the extent of the sub-contract sum only was held in trust for them by Rasshin. However, I do not agree that the Directors of Rasshin have breached that trust when payment in full was not effected. There must be clear evidence of their personal involvement, jointly and severally, in not just withholding the payment but using them for their own personal gains before I could accede to NCFM's claim at paras 13 and 14 of their re-amended statement of claim that these Directors had 'utilized the trust money for their own personal purpose and/or for the 1st defendant' and that they had done so 'to defraud' them.

[42] Furthermore, they have pursued their contractual remedy and I have agreed that they were entitled to the balance of the sub-contract sum with interest. That is sufficient restitution for their loss and to award them damages for breach of trust on top of the liquidated amount given for breach of contract would tantamount to unjust enrichment. I would therefore disallow their claim under this head.

[43] So much for NCFM's claim. I will next consider Rasshin's counterclaim.

The Loss Of Profit

[44] Rasshin's claim to be entitled thereto stems from what they alleged as breaches of the sub-contract agreement by NCFM and that NCFM has repudiated the said contract (see para. 26 of the amended counterclaim) and this claim is very much tied to the deductions and liquidated ascertained damages imposed on NCFM which resulted in a negative balance for NCFM's account. Since I have decided on these two issues earlier in favour of NCFM, it stands to reason that I would rule against Rasshin on their claim for loss of profit.

Rescission Of The Sub-contract Agreement

[45] There is no merit in the declaration sought by Rasshin on this as they have agreed, after the relocation of SMK Medamit to vary the agreement and take over the construction at SMK Medamit themselves.

[46] I would next consider their claim for damages for trespass and harassment.

The Trespass And Harassment

[47] Rasshin and it's Directors alleged that NCFM through it's agent or employee had trespassed into the office of the Chairman of Rassnorm Sdn Bhd and threatened the Directors and staff of the company and put them in fear of their lives. Ruslan also specifically mentioned the other specific dates when these happened ie, 4 May 2006 at 1050 hrs, 5 May 2006 at 1030 hrs, 11 May 2006 at 2pm, 15 May 2006 at 12pm and 5.30pm, 16 May 2006 at about 2pm, 26 May 2006 and 30 May 2006 in his witness statement (WSDW2).

All these harassments were pertaining to the unpaid debts under this project. Two names were given in his evidence – Chong Chew Huat (Fatt) and Roland Chai Chiun Chieh. These two persons had given their name cards to them during their alleged intrusion to their office on 30 May 2006.

[48] In addition, Suriyani binti Mahli, Rasshin's Executive Secretary at the material time gave direct evidence of the same incidents in her witness statement (WSDW3).

[49] Following the incidents, Rasshin and Suriyani had lodged police reports (at pp. 376, 377 and 378 of exh. C5) and one Sgt. Major Mohd Noor bin Din (DW6) testified as regards the police investigation into the incident. He said in his witness statement that Chong Chiew Huat was called to the police station together with Ruslan and Suriyaini and there the parties agreed to have the matter settled by civil action. The Sergeant confirmed that based on their record, this Chong Chew Huat was involved in gangsterism and at the time of this trial, he was under restricted residence in Lambir, Miri for two years.

[50] I have no hesitation to accept the evidence of the Sergeant with respect to the police investigation into this case and his evidence strengthened the probability that NCFM had in desperation for the money owing to them resorted to unlawful means to get it by taking the law into their own hands. That the staff and Directors of Rasshin suffered as a result of this harassment has also been proved on a balance of probability. Therefore, I would grant them damages in the sum of RM200,000 for the harassment suffered and would deduct the same from the balance of the sum due under the sub-contract.

Conclusion

[51] I would re-state my findings as follows:

(i) The plaintiff's claim for the balance of the sub-contract sum ie, RM1,282,658.59 is allowed as their further claim for earthworks in SMK Medamit at RM112,644 making a total of RM1,395,302.59. However, setting off RM200,000 being damages for the harassment, and a further sum of RM187,324 being damages for delay in completing the project, judgment for the plaintiff is entered for RM1,007,978.59 only.

(ii) The declaration sought to declare the liquidated ascertained damages and deductions totalling RM945,041.81 as illegal, null and void is granted.

(iii) The plaintiff's claim for damages for breach of trust against the 2nd to the 4th defendants is dismissed.

(iv) The 1st defendant's counterclaim for loss of profit is dismissed.

(v) The defendants' claim for damages for harassment is allowed in the sum of RM200,000 to be deducted from the amount due under the sub-contract agreement.

(vi) Damages for delay in completing the project is allowed at RM187,324 representing 30% of the liquidated ascertained damages of RM624,413.44 imposed by the Ministry to Rasshin.

(vii) Interest on the judgment sum at 8% per annum from 17 May 2004 until full and final payment.

(viii) In view of the above, I would only grant the plaintiff two-thirds of the cost of this action to be taxed unless agreed. If not agreed, getting-up is capped at RM40,000.